United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-2272

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -X

UNITED STATES OF AMERICA, :

Appellee, :

-v- : DOCKET NO.: 74-2272

ANTHONY LA VECCHIA, et al. :

Appellant, :

HERBERT KURSHENOFF, :

Petitioner. :

- -X

PETITION FOR RE-ARGUMENT OR RE-HEARING EN BANC

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PETITION FOR RE-ARGUMENT OR RE-HEARING EN BANC

Herbert Kurshenoff, petitioner herein, respectfully applies pursuant to Rules 35 (c) and 40 (a) of the Federal Rules of Appellate Procedure for re-argument or re-hearing en banc of the decision of this Court rendered April 4, 1975, (LUMBARD, HAYS, and MULLIGAN, CJJ.) affirming a judgment of conviction for conspiracy to possess counterfeit (18 USC §371) rendered on September 13, 1974, in the United States District Court for the Eastern District of New York (JUDD, J.).

SUMMARY OF ARGUMENT

Petitioner seeks re-argument because the explicit holding of the concurring opinion (Mulligan, CJ), and the reasoning

behind the majority opinion (Lumbard and Hays, CJJ),* that petitioner was guilty of a separate conspiracy from that charged in the indictment, raises the issue of whether there was any venue in the Eastern District since none of the overt acts charged in the indictment relating to that separate conspiracy took place in that jurisdiction.

Petitioner also seeks re-hearing en banc to clarify the issues of multiple v. single conspiracies and of prejudice where multiple conspiracies have been shown to have existed.

STATEMENT

Indictment 73 Cr. 305 charged petitioner and numerous others with being co-conspirators in a two year long counterfeit distribution conspiracy.** Petitioner was tried with three others (Anthony La Vecchia, Edward Bogan and Nicholas Andriotis), was convicted of the conspiracy, and received a sentence of six months in prison (to be followed by one year probation) and a $750 fine.

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* The opinion is set forth, in full, as Appendix "A".

**Petitioner's co-defendants were also charged with various substantive counterfeiting offenses; petitioner was only charged in the conspiracy count.

If the testimony of the accomplice-turned-witness Russo was believed, the jury could find that petitioner purchased counterfeit from him on two occasions in 1972. Both sales themselves, took place in New York County, in the Southern District of New York State (slip op. at 2743, 2744 and n.2, 2757, 2759-61); the overt act in the conspiracy count which refers to these transactions revealingly omits any reference to their place of occurrence, in marked contrast to the other overt acts which are alleged to have taken place in the Eastern District.

REASONS FOR GRANTING THE PETITION

The concurring opinion of Judge Mulligan specifically holds that petitioner was guilty of, at most, membership in a buy-sell conspiracy with Russo (slip op. at 2757). The majority opinion seems to hold that Kurshenoff was a member of the conspiracy charged in the indictment, but a careful reading of the majority opinion will reveal that this was not so.

At p. 2757 of the majority opinion it was stated that the jury "could" have inferred petitioner's knowledge of, and participation in, the broader conspiracy.* At p. 2755 n.11 it was

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*The basis of this statement is the majority's conclusion that because Russo twice went to petitioner after obtaining counterfeit "Kurshenoff must have known that other persons were supplying Russo with counterfeit money" (slip op. at 2757). The concurring opinion, it is respectfully submitted, demolishes this conclusion by demonstrating that petitioner dealt only with Russo and Russo never said he got the counterfeit from a third party (slip op. at 2760-61). Re-argument should be also granted on the basis of this erroneous statement of the majority.

stated that a variance from the indictment was permissible since it "did" not prejudice any of the defendants; this statement was made in approving the lower court's multiple conspiracy charge. Reading these two statements together, it is submitted that the majority was holding that the jury could have found petitioner to be a member of either the conspiracy charged or the separate conspiracy but that it made no difference because there was no prejudice.

The error in both the majority and concurring opinions is that prejudice is confined to evidential matters, e.g., spillover, as in KOTTEAKOS v. United States, 328 U.S. 750 (1946). What both opinions failed to perceive is that no overt act in the separate conspiracy occurred in the Eastern District. The only overt act referring to petitioner refers to a "meeting" between Russo and petitioner in 1972. It is clear that all of the meetings between Russo and petitioner took place in petitioner's place of business in Manhattan.

It is hornbook law that an overt act occurring in the prosecuting jurisdiction must be charged and proved. Since no overt act of the Russo-petitioner conspiracy was ever set forth in the indictment as having occurred in the Eastern District the overt act requirement was not satisfied and the conviction must be reversed.

Not only was no overt act proven against petitioner, but the related requirement that venue be demonstrated was unsatisfied. While venue may only have to be proven by a preponderance of the evidence rather than beyond a reasonable doubt (United States v. CATALANO, 491 F 2d 268, 276 (2d Cir.), cert. den. ____U.S.____, 43 U.S.L.W. 3208 [10/15/74]) it must be proven in some fashion or a conviction cannot stand. TRAVIS v. United States, 364 U.S. 631 (1961) (venue is a matter of Constitutional dimension under the Sixth Amendment). As this Court said in United States v. CANDELLA, 487 F 2d 1223, 1227 (2d Cir. 1973):

> "While the question of whether the trial is conducted almost literally at one end of the Brooklyn Bridge or the other might seem to be a quibble, questions of venue in criminal cases are of constitutional concern."

Since it is clear that not a single overt act of the Russo-Kurshenoff conspiracy took place in the Eastern District, petitioner's conviction must be reversed.*

Re-hearing en banc should also be granted to consider the constantly, and more increasingly, re-occurring problems in the area of single v. multiple conspiracies.

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*During the colloquy on the motion to dismiss, petitioner's trial counsel specifically argued that his client was guilty of, at most, this separate conspiracy, and that no acts relating thereto had occurred in the Eastern District; the trial court overruled these objections (T. 969-73) (This portion of the transcript is annexed as Exhibit "B")

Different panels of this Court have recently expressed their view "that it has become all too common for the Government to bring indictments against numerous defendants on the claim of a single conspiracy when the criminal acts could more reasonable and sensibly be regarded as two or more conspiracies. See United States v. MILEY, [____F 2d____] slip op. [2363], 2389 n.10; United States v. SPERLING, [506 F 2d 1323], 1340-41." Slip op. at 2761. Yet the Government continues, as in this case, to disregard this advice.

When the issue is raised on appellate review, this Court has resorted to strained reasoning and analogies to affirm. As in the present case, the majority mistakenly equated "the sale of counterfeit money with illegal drug trafficking". Slip op. at 2760. By en banc decision this Circuit should declare just how far it is willing to apply the assumptions it indulges in re: drug transactions to other dis-similar criminal activity.

Lastly, the issue of prejudice should be clarified. Is the test to be an adaptation of harmless error; is it to be a balancing test, and, if so, is the test to be how clear the evidence on the separate conspiracy is and/or is the test to be how much other evidence was adduced; etc., etc?

CONCLUSION

FOR THE ABOVE-STATED REASONS, RE-ARGUMENT AND/OR REHEARING EN BANC SHOULD BE GRANTED, AND THE CONVICTION REVERSED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 599—September Term, 1974.

(Argued January 22, 1975 Decided April 4, 1975.)

Docket No. 74-2272

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v—

ANTHONY LA VECCHIA, EDWARD BOGAN, HERBERT KURSHENOFF and NICHOLAS ANDRIOTIS,

Defendants-Appellants.

Before:

LUMBARD, HAYS, and MULLIGAN,

Circuit Judges.

Appeal from judgment of the Eastern District, Judd, *J.*, entered after trial where defendants were found guilty of various counterfeiting offenses, asserting that trial judge made improper remarks to jury, that evidence obtained during searches was improperly admitted, and that evidence was insufficient to establish conspiracy charged.

Affirmed.

DAVID A. DE PETRIS, Assistant United States Attorney, Eastern District of New York (David G. Trager, United States Attorney,

"APPENDIX A"

Eastern District of New York, and Paul B. Bergman, Assistant United States Attorney, on the brief), *for Appellee.*

James La Rossa, Esq., New York, N.Y. (La Rossa, Shargel & Fischetti and Gerald L. Shargel, New York, N.Y., on the brief), *for Appellants Anthony La Vecchia and Edward Bogan.*

Barry Krinsky, Esq., Brooklyn, N.Y. (David W. McCarthy, Mineola, N.Y., on the brief), *for Appellant Herbert Kurshenoff.*

Ira Leitel, Esq., Brooklyn, N.Y. (Harold B. Foner, Brooklyn, N.Y., on the brief), *for Appellant Nicholas Andriotis.*

Lumbard, *Circuit Judge:*

Anthony La Vecchia, Edward Bogan, Herbert Kurshenoff, and Nicholas Andriotis appeal from their conviction by an Eastern District jury of various counterfeiting offenses. See 18 U.S.C. §§ 371, 472, 473.[1] La Vecchia and Bogan claim that several remarks of the trial judge were so unfair and unsupported by the evidence as to require

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1 La Vecchia was convicted of one count of conspiracy to possess and distribute counterfeit $10 Federal Reserve notes and four counts of possession and distribution of such notes. He was sentenced to concurrent four-year terms on each count and fined $5000.

Bogan was convicted on the conspiracy count and of one count of distributing counterfeit money. He was sentenced to concurrent four-year terms on each count.

Kurshenoff was convicted on the conspiracy count and was sentenced to six months in prison to be followed by twelve months on probation. He was fined $750.

Andriotis was convicted on the conspiracy and of one count of receiving counterfeit money. He was sentenced to concurrent sentences of one year—eight months of which was suspended and put on probation for two years.

reversal of their convictions and that the single conspiracy alleged in the indictment was not proven. In addition, La Vecchia asserts that some evidence was improperly introduced at trial because it was obtained by an illegal search of his automobile, while Bogan asserts that the affidavit in support of the issuance of the warrant authorizing the search of his business premises was legally insufficient and contained a materially false statement. Kurshenoff and Andriotis both claim that the proof was insufficient to establish their membership in a conspiracy to distribute counterfeit money. We affirm.

The heart of the government's case consisted of testimony by two former counterfeit distributors, John McMillan and Dominic Russo, who had been caught selling counterfeit money by government agents. McMillan testified that in June 1971 he bought $300,000 in counterfeit $10 Federal Reserve notes on consignment from La Vecchia for nine points (nine cents on the dollar), and that he sold all of the counterfeit to Russo and six other individuals at various times for various prices. Russo testified that he bought a total of $20,000 in counterfeit from McMillan and that he sold it to other persons, several of whom were later arrested for passing the counterfeit money.

In June 1972 McMillan and Russo discussed obtaining further counterfeit and thereafter McMillan contacted La Vecchia and bought $25,000 in counterfeit $10 Federal Reserve notes. He delivered these to Russo who testified he sold $5000 to Kurshenoff and about $15,000 to one Phil Martino. The remaining notes were not good enough to attempt to sell. McMillan testified that shortly thereafter he bought a second $25,000 package from La Vecchia. This time when he went to La Vecchia's house to pick up the money, he had to wait until someone brought the counterfeit to La Vecchia. McMillan gave the money to Russo and

Russo testified that he then sold another $5000 package to Kurshenoff[2] and another $15,000 or so to Martino.

About the beginning of August, McMillan bought $100,000 from La Vecchia and delivered it to Russo, who sold $10,000 to Martino. In addition, Russo attempted to negotiate a sale of counterfeit to Andriotis. They were unable to agree on a sales price, and McMillan took charge of the negotiations and reached a satisfactory agreement with Andriotis for the sale of a $10,000 package. Russo testified that Andriotis told him to drive down 44th Street and give the package to "Paul" when he stops you and asks if you have a package for me. Russo followed these directions and made the delivery. Andriotis paid Russo $1400 for the package. Thereafter Martino was arrested when he sold counterfeit to a Secret Service agent. Martino arranged a meeting between Russo and the agent and Russo sold a $5000 package to the government agent, after which Russo was arrested. He implicated McMillan as his source and McMillan was arrested in January of 1973.

At this point the government arranged an elaborate scheme in an attempt to catch La Vecchia red-handed. On February 13, 1973, McMillan contacted La Vecchia and said he wanted to buy a $25,000 package and take delivery on February 15.[3] On the 15th, McMillan met with La Vecchia at Beacon Discount Sales, 125 East 18th Street, to consummate the transaction. McMillan was to pay La Vecchia $2500 and in turn receive a key to a Penn Station locker where the counterfeit would be placed. After finalizing these arrangements La Vecchia left 125 East 18th in

2 Both times Russo sold a package to Kurshenoff, McMillan testified that he waited in the car downstairs in front of Kurshenoff's place of business.

3 On both the 13th and the 15th McMillan was outfitted with a radio transmitting device so the arrangement of the sale was overheard by the government agents.

his car and shortly thereafter government agents observed him entering 270 Lafayette Street, where Bogan's printing shop was located.[4] La Vecchia left shortly after entering the building. Meanwhile, Bogan arrived at 125 East 18th shortly after La Vecchia had left. He received a telephone call and left. He was followed by agents[5] who observed him meet with La Vecchia in the latter's car. La Vecchia then drove to 125 East 18th, picked up McMillan, and gave McMillan the locker key in return for $2500 in genuine currency, the serial numbers of which had been recorded by government agents. Thereafter, the $25,000 package of counterfeit was found in the Penn Station locker. At this point La Vecchia and Bogan were arrested.

At the time of his arrest, $50 of the prerecorded purchase money was found on La Vecchia's person, and the remaining $2450 was found in the trunk of his car. Subsequent to the arrests, a warrant search of 270 Lafayette was conducted. Some $650,000 in counterfeit notes was found along with the plates and negatives used to print them. Bogan's fingerprints were found on the wrappings of the Penn Station package and on one plate, one negative, and several notes found at 270 Lafayette. A government expert testified that the negatives at 270 Lafayette had been used to produce the counterfeit involved in the arrests in 1971, 1972, and 1973.

The jury convicted all four defendants and no question is raised concerning the sufficiency of the evidence on the substantive counts.

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4 An agent had visited these premises a week before and had noted that signs reading "Beacon Press" and "Beacon Sales" were displayed there.

5 McMillan was still present at 125 East 18th when Bogan arrived, and he told the agents by radio that he recognized Bogan's voice as the voice of the person who delivered the counterfeit to La Vecchia's house in 1972.

La Vecchia and Bogan initially argue that certain of the trial judge's remarks at the close of the trial constituted improper comment on the evidence in the case. It has long been recognized that a federal trial judge may comment on the evidence. *Quercia* v. *United States*, 289 U.S. 466 (1933). The only issue here is whether the challenged comments were so unfair and unwarranted as to require reversal of defendants' convictions.

The first comment to which defendants object concerned the fingerprint evidence. Both La Vecchia's and Bogan's counsel stressed in their summations that only a few of Bogan's fingerprints had been found on the thousands of bills and the plates and negatives seized at 270 Lafayette. They both suggested to the jury that the prints might have been made at police headquarters, hinting that perhaps the prints resulted from the agents handing Bogan several bills at that time. In his summation of the evidence, the trial judge remarked:

> I did not hear any testimony about what is necessary to produce clear fingerprints but I was impressed by the fact that after examining all this counterfeit money Mr. Ball [the fingerprint expert] found only seven latent prints besides those that were on, so apparently fingerprints do not show up every time.

Defendants claim that this statement may have been factually inaccurate and that it was unfair comment. We disagree. The statement was accurate, at least insofar as there is evidence in the record to support it. The government's fingerprint witness indicated in his testimony that the simple act of touching an object does not always produce fingerprints on the object.[6]

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6 After both the witness and defense attorney had handled some counterfeit bills, the attorney asked:

Bogan and La Vecchia also take issue with the judge's remark that there were "only seven latent prints." In objecting, defense counsel stated that the fingerprint expert stated that "there were only seven latent prints, meaning seven different *types* of fingerprints, not seven individual prints." (emphasis added) Our review of the expert's testimony leads us to conclude that he meant that he found seven individual prints. However, this is immaterial since the trial judge did not say seven *individual* prints, but in fact used the same language that defense counsel asserted the expert used—"seven latent prints."

These statements of the trial judge were supported by evidence in the record, and they were not improper or unfair comment. The judge did not add to or distort the evidence in the record. Compare *United States* v. *Pinto*, 503 F.2d 718 (2d Cir. 1974).[7]

Defendants' second complaint of an improper remark by the trial judge concerned the judge's statement that

> "[t]here was a suggestion by the defendants that you should consider the fact that the defendants are businessmen and the witnesses are criminals. One of the problems federal court have in [is?] trying to see that we do not deal with white-collar criminals on a different basis from the crimes of working men."

The judge later stated in a similar vein, "If these defendants are not guilty you should acquit them. If you

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Q. [M]y fingerprints are on these bills?
A. Not necessarily.
Q. They might not be?
A. Might not be.
Q. Your fingerprints might be on the bills?
A. Might be.

7 There was nothing in the record that supported defense counsel's suggestion that Bogan's fingerprints were placed on the bills at the police station.

find they are guilty beyond a reasonable doubt, the fact that they are businessmen is no excuse and you might consider that for all the counsel said about Mr. McMillan's bad character, Mr. La Vecchia talked with him for several hours on February 13th and 15th although you are asked to believe it had nothing to do with counterfeit."

These comments were provoked by defense counsel's attempt to suggest that McMillan might attempt to implicate honest businessmen in this counterfeiting operation because he was afraid to identify his real suppliers. The basis of the suggestion was testimony that McMillan had had some earlier connection with members of organized crime in a drug transaction. Defense counsel noted that McMillan's suppliers in this criminal undertaking might be members of organized crime and that McMillan might be anxious to avoid the possible consequences of implicating them.

The judge's comment on the possible implications to be drawn from La Vecchia's meetings with McMillan was clearly uncalled for. It appears that the remainder of the trial judge's comments were sparked by his mistaken belief that defense counsel had suggested that since defendants were businessmen, they should not be found guilty. While the remarks would have better been left unsaid, we do not think that they prejudiced defendants. The statement that white-collar criminals should not receive special consideration is in itself unobjectionable. And standing alone the statement about La Vecchia's associations with McMillan does not call for reversal of La Vecchia's conviction. It consists of only one statement in an otherwise proper charge. In addition, there was overwhelming and uncontroverted direct evidence that La Vecchia was involved in this counterfeiting operation. In light of the total record, we find no reversible error in the judge's

comments on the evidence. See *United States* v. *Pinto*, *supra*; *United States* v. *Birnbaum*, 373 F.2d 250 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967).

La Vecchia's second argument is that the district court improperly denied his motion to suppress $2450 in prerecorded government monies which were found during a warrantless search of the trunk of his automobile. The money was part of the $2500 advanced to McMillan for the purchase of counterfeit money. The remaining $50 in prerecorded money was found on La Vecchia's person when he was arrested.

The necessity for a warrant in these circumstances is governed by 49 U.S.C. §§ 781-89 and our decision in *United States* v. *Francolino*, 367 F.2d 1013 (1966), *cert. denied*, 386 U.S. 960 (1967), which was most recently reaffirmed in *United States* v. *Capra*, 501 F.2d 267 (2d Cir. 1974), *cert. denied*, —— U.S. —— (March 24, 1975). Section 781(a) provides that

> [i]t shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft: . . . or (3) to use any vessel, vehicle, or aircraft to facilitate the . . . sale . . . of any contraband article.

The statute defines "contraband" to include counterfeit money, 49 U.S.C. § 781(b), and authorizes the seizure of any vehicle used in violation of section 781. 49 U.S.C. § 782. *Francolino* authorizes the warrantless search of vehicles subject to seizure under section 782. The only requirement is that there be probable cause to believe that the vehicle is seizable under section 782.

La Vecchia claims that *Francolino* is inapplicable to this case for two reasons. First, La Vecchia argues that the agents had no probable cause to believe that the car had

been used to transport contraband. While it is true that the agents knew that the car was not used to transport the counterfeit money directly to McMillan, there was evidence in the record that showed that counterfeiters often carry "extra" counterfeit money with them on the chance that the buyer may be persuaded to purchase more than he had originally intended to buy. In fact, one agent testified that this happened in one of the transactions involved in this case. Moreover, during the day in question La Vecchia had been to the address which was believed to be the source of the counterfeit money and he had met in his car with Bogan who transported the $25,000 in counterfeit that was placed in the Penn Station locker. Taken together, and in consideration of the agent's knowledge of La Vecchia's extensive counterfeiting activities, these facts were a sufficient basis to give the agents probable cause to believe that the car had been or was being used to transport contraband. *See United States* v. *Capra*, 501 F.2d at 820.

Even if we concluded that the agents did not have probable cause to believe that La Vecchia's car had been used to transport contraband, the *Francolino* rule would still apply here. The third clause of section 781 make it unlawful to use a vehicle to facilitate the sale of contraband, and there is no doubt that the agents had good reason to believe that La Vecchia's car was used to facilitate the sale. The complex delivery plan adopted by La Vecchia and Bogan necessitated that each of them travel quickly about the city. La Vecchia's use of his automobile was a necessary part of the transaction. The car was used to find Bogan to consummate the deal. Indeed, "token" possession of the contraband was transferred in the car when Bogan gave La Vecchia the key to the Penn Station locker and when La Vecchia later gave it to McMillan. Thus, the officers had sufficient reason to believe that La Vecchia's car was used to facilitate the transfer of contraband. *See*

United States v. *One 1957 Lincoln Premiere*, 265 F.2d 734 (7th Cir.), *cert. denied*, 361 U.S. 823 (1959); *United States* v. *One 1950 Buick Sedan*, 231 F.2d 219 (2d Cir. 1956); *United States* v. *One 1951 Oldsmobile Sedan*, 126 F.Supp. 517 (D. Conn. 1954); *United States* v. *One 1941 Pontiac Sedan*, 83 F.Supp. 999 (S.D.N.Y. 1948); *United States* v. *One Dodge Coupe*, 43 F.Supp. 60 (S.D.N.Y. 1942). Compare *United States* v. *(One) (1) 1971 Chevrolet Corvette Automobile*, 496 F.2d 210 (5th Cir. 1974); *Howard* v. *United States*, 423 F.2d 1102, 1103 (9th Cir. 1970).

Second. La Vecchia next notes that his car was never actually seized whereas in *Francolino* the car was seized after it was searched. He then argues that *Francolino* should not apply when the car is never seized. We disagree. In *Francolino*, we expressly rejected the argument that a vehicle must be seized before it can be searched. If a vehicle can be searched prior to seizure, the actual act of seizure is unimportant. As the agents had probable cause to believe that La Vecchia's car was subject to seizure under section 782, they could legally search it. It makes no sense to say that some later action or inaction on their part would somehow void the theretofore valid search. The time of the search is the critical time, and at that time the warrantless search was permissible because the agents believed the car was subject to seizure. What is later done with the car is irrelevant. See *United States* v. *Trabucco*, 424 F.2d 1311, 1313 n.2 (5th Cir.), *cert. dismissed*, 399 U.S. 818 (1970).

Finally, we note that whether or not the search of the automobile was improper, the admission of the $2450 in marked money was harmless error. Part of the marked money had been found on La Vecchia's person and no question has been raised concerning its admissibility. Since part of the package of premarked money was admissible and there was evidence that $2500 had been paid to La

Vecchia, admission of the remaining part of the package of premarked money was harmless beyond a reasonable doubt. *Chapman* v. *Calif.*, 386 U.S. 18, 21-24 (1967); *Harrington* v. *California*, 395 U.S. 250 (1969); *Chambers* v. *Maroney*, 399 U.S. 42, 53 (1970); *United States* v. *Bazinet*, 462 F.2d 982, 988 n.4 (8th Cir.), *cert. denied*, 409 U.S. 1010 (1972).

Third, La Vecchia and Bogan argue that the warrant authorizing the search of the premises of Beacon Discount Sales and Beacon Printing at 270 Lafayette Street was improperly issued. First, they suggest that the affidavit in support of the warrant was insufficient because it failed to establish probable cause that counterfeit notes and counterfeiting paraphernalia would be found at that address. We disagree. The affidavit provides a reasonable basis for believing that La Vecchia was a major supplier of counterfeit money and that Bogan had delivered counterfeit bills to La Vecchia in the past and had apparently placed such bills in the Penn Station locker on February 15, 1973. Furthermore, it indicated that Bogan had been arrested on the premises and a counterfeit note and counterfeit stamps had been found on his person, and that the counterfeit money in this case had been produced by offset printing and the agents at the time of the arrest and on one earlier occasion had seen offset printing presses on the premises. In light of La Vecchia's and Bogan's unquestioned connections with the premises, the presence of the type of presses that produced the counterfeit, and Bogan's role as deliverer of counterfeit, it was reasonable to believe that counterfeit monies and plates would be found on the premises at 270 Lafayette. The affidavit was clearly sufficient; there was probable cause to believe that counterfeit and counterfeiting paraphernalia would be found at 270 Lafayette.

La Vecchia and Bogan also claim that the affidavit was insufficient because it contained a materially false statement.[8] Specifically, the affidavit alleged that La Vecchia was doing business as Beacon Discount Sales at 270 Lafayette Street and at 125 East 18th Street in partnership with Edward Bogan and that the two men also operated Beacon Printing. The affidavit indicated that these assertions were based in part on an examination of a Dun and Bradstreet file on the businesses. It is conceded that that file indicated only that Bogan was the owner of Beacon Printing. While the wording of the affidavit is ambiguous[9] it is arguable that the allegation that La Vecchia owned Beacon Printing was based entirely on the information incorrectly attributed to Dun and Bradstreet. However, since La Vecchia was otherwise connected with the premises[10] we agree with Judge Judd's conclusion that the false statement was immaterial. As indicated in our discussion of the affidavit's sufficiency, there were more than ample grounds for issuing the search warrant without consideration of La Vecchia's alleged co-ownership of Beacon Printing. See *United States* v. *Gonzales*, 488 F.2d 833, 836-38 (2d Cir. 1973).

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8 The district court noted that there was no showing that the false statement was made intentionally. Indeed, in light of all the other facts detailed in the four-page affidavit there was certainly no reason for the agent to make any false statement in this one minor respect.

9 The affidavit could be interpreted as alleging that La Vecchia's co-ownership of Beacon Printing was based on general investigations by agents and information obtained by informants, and not solely on the Dun and Bradstreet report.

10 There is no claim that La Vecchia was improperly connected to the premises through Beacon Discount. McMillan had told the agents that La Vecchia operated Beacon Discount and that one of his places of business was 270 Lafayette. A Beacon Discount sign had been observed earlier by an agent at 270 Lafayette.

Finally, La Vecchia and Bogan argue that the evidence did not establish the existence of a single conspiracy as was charged in the indictment. They contend that the trial judge incorrectly viewed the evidence as establishing a horizontal conspiracy between La Vecchia and Bogan spanning 1971 to 1973. La Vecchia and Bogan contend that there was no evidence that they conspired with either the buyers or distributors of the bogus currency and that the success of their conspiracy did not depend on the performance of others unknown to them. They suggest they were prejudiced by the admission of evidence concerning McMillan's and Russo's activities because that evidence diverted the jury's attention from the careful consideration of their guilt or innocence.

La Vecchia and Bogan clearly conspired with each other to print and distribute counterfeit. Since the negatives found at 270 Lafayette were used to produce all of the counterfeit involved in this case, their conspiracy lasted at least for the twenty-month period covered in the indictment. The amount of counterfeit they printed was so large that the success of their conspiracy obviously depended on distribution of the counterfeit by others. McMillan's continual buying of counterfeit ($450,000 on five occasions within a twenty-month period) was more than sufficient to enable the jury to conclude that he was a member of the La Vecchia-Bogan conspiracy as a wholesale distributor of bogus money.

Moreover, McMillan's purchases of counterfeit were so substantial that La Vecchia and Bogan knew, or certainly should have known, that McMillan must have dealt with others in passing the counterfeit to the public. The workings of such a counterfeiting operation are analogous to those of a large narcotics ring. While each member of the conspiracy may not know of others in different levels,

certainly those at the top, who are aware of the scope of the operation, know that its success depends on many persons—ringleader, printer, "wholesale buyers, and distributors." *United States* v. *Arroyo*, 494 F.2d 1316, 1319 (2d Cir.), *cert. denied*, —— U.S. —— (1974). Thus, McMillan's efforts at distribution were part of the La Vecchia-Bogan conspiracy to print and distribute counterfeit. Evidence concerning McMillan's activities was properly admitted.

The only argument raised by Andriotis and Kurshenoff is that the evidence was insufficient to establish that they were members of the conspiracy involving La Vecchia, Bogan, McMillan, and Russo. The evidence indicated that Andriotis bought one package of counterfeit money from Russo in 1972 and that Kurshenoff bought two such packages in the same year. In the light of their more limited involvement, the trial court instructed the jury that they could properly conclude that there were three conspiracies shown by the evidence—one in each of 1971, 1972, and 1973—and that Kurshenoff and Andriotis were members of only the 1972 conspiracy.[11]

We have previously held:

> For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotics laws, there must be independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy, or the single act itself must be one from which such knowledge may be inferred.

United States v. *De Noia*, 451 F.2d 979, 981 (2d Cir. 1971) (per curiam). The evidence must be sufficient to justify "an

11 A variance from the indictment is permissible since the variance did not prejudice any of the defendants. See *United States* v. *Agueci*, 310 F.2d 817, 827 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

inference that [a defendant] knew he was involved in a criminal enterprise of substantial scope." 451 F.2d at 981.

Since Andriotis and Kurshenoff intended to pass or sell the counterfeit bills they bought from Russo they were in fact involved in the distribution of counterfeit money. The question is whether the record contains sufficient facts from which the jury could infer their knowledge or the broader criminal enterprise involved in this case. The fact that Andriotis and Kurshenoff dealt with only one or two members of this counterfeiting conspiracy does not preclude a finding that they were members of the conspiracy charged in the indictment. *United States* v. *Agueci*, 310 F.2d 817, 826 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

Examining the evidence of Andriotis' involvement we think the fact that he dealt with both Russo and McMillan is evidence from which the jury could infer that he knew that he was involved in a broad criminal enterprise. Moreover, Andriotis negotiated the price in terms of "points" suggesting some familiarity with the counterfeiting trade which often is conducted on a large scale with many persons involved. *United States* v. *Rizzo*, 492 F.2d 443 (2d Cir. 1974); *United States* v. *Dono*, 428 F.2d 204 (2d Cir.), *cert. denied*, 400 U.S. 829 (1970); *United States* v. *Gonzalez-Carta*, 419 F.2d 548 (2d Cir. 1969). The size of Andriotis' purchase ($10,000) was sufficiently large that the jury could infer that he must have known that he was engaged in a substantial operation. In any event, the evidence to convict Andriotis of the substantive count was clearly sufficient. Since he received concurrent sentences on the conspiracy and substantive counts, a valid conviction on the substantive counts provides a sufficient basis to affirm the judgment from which Andriotis appeals. *De Noia*, 451 F.2d at 981.

As to Kurshenoff, we have little hesitation in affirming his conviction for conspiracy. Like Andriotis, he negotiated

the sale price in terms of points. Moreover, he bought large packages of counterfeit ($5000 each) from Russo on two occasions. In fact, Russo called him up immediately after receiving his second batch of counterfeit from McMillan in the summer of 1972 and told Kurshenoff he was coming right over with some. This action by Russo could lead the jury to believe that Kurshenoff had become a regular participant in the distribution of counterfeit. Kurshenoff must have known that other persons were supplying Russo with counterfeit money. On the basis of this information the jury could properly infer that Kurshenoff had "some knowledge" of the broader conspiracy and that Kurshenoff knew he was involved "in a criminal enterprise of substantial scope." *De Noia*, 451 F.2d at 981. See also *United States* v. *Rizzo*, 492 F.2d 443 (2d Cir. 1974).

We have considered the other contentions raised by appellants and find them to be without merit.

Affirmed.

MULLIGAN, *Circuit Judge* (concurring):

I concur in the majority opinion except that I cannot agree that the evidence adduced at the trial of this case was sufficient to establish that Herbie Kurshenoff was guilty of the single chain conspiracy charged in the indictment. There was a variance in the proof which at best established that Kurshenoff was guilty of a separate conspiracy with Russo for the sale and purchase of the counterfeit $10 bills. This was not the crime charged in the indictment, not the theory of the Government's case below or on appeal and not the conspiracy charged to the jury by the court.[1] At

1 The conspiracy charged in the indictment extended from June, 1971 to February 15, 1973. The district judge instructed the jury that if it found separate conspiracies in 1971, 1972 and 1973, then "transactions and statements in 1971 and 1973 could not be used

the same time, as we have recently noted in *United States* v. *Miley*, slip op. 2363, 2390 (March 19, 1975):

> This, however, does not automatically require reversal. Where the indictment charges one conspiracy but the proof shows more than one, a variance is not necessarily fatal. "The true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger* v. *United States*, 295 U.S. 78, 82 (1935).

Finding no such prejudice, I am compelled to concur. The spill-over claim here is not compelling and did not approach the danger of transference of guilt found persuasive in *Kotteakos* v. *United States*, 328 U.S. 750 (1946).[2] See *United States* v. *Miley*, *supra*, at 2393.

In my view, there is no evidence to support a reasonable inference by a jury that Kurshenoff was engaged in any ongoing venture with Bogan and La Vecchia, the printers and promoters of the bogus bills. It is conceded that he never met any one of the alleged conspirators except for

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against Mr. Andriotis and Mr. Kurshenoff in connection with the sales to them that were alleged to have been made in the summer of 1972." The concern of this opinion is not with the time of the conspiracy but rather with the alleged link between Kurshenoff and Bogan and La Vecchia.

2 The recognition that admission at a trial of several defendants of evidence of another conspiracy with which a particular defendant is not associated is inimical to his intersts is not new. In 1603, in the treason trial of Sir Walter Raleigh, Sir Edward Coke reminded the jury that two conspiracies against the King had been discovered. Raleigh interrupted, addressing the jury: "I pray you, Gentlemen, remember that I am not charged with . . . the treason of the priests." Coke responded that all these treasons, "like Sampson's foxes, were joined together at the tails, though their heads were severed." C. Bowen, The Lion and the Throne 193 (1957). The origin of the term "spoke" conspiracy?

Russo, who, in the summer of 1972, made two sales of counterfeit bills to Kurshenoff in his Manhattan wig emporium. Mr. Esquire.[3] While their total face value was $10,000, Kurshenoff's investment was $1900. Although the court properly charged that a defendant need not know the identity of his fellow conspirators, he must know or have reason to believe that they exist as functioning operatives in a continuing criminal enterprise—else how can he be said to have a stake in and to have adopted the apparatus of their venture?

The judge charged the jury:

> If you find that all the counterfeit bills were printed from plates made from the same negatives that were found in 270 Lafayette Street on the night Mr. Bogin [sic] and Mr. La Vecchia were arrested, you can find that it was a single conspiracy.

This, in my view, is error since there is nothing in the record to link Kurshenoff with Bogan and La Vecchia. Although the bills he bought in fact originated with the principal malefactors, how did the Government establish any nexus of intentional complicity between them and Kurshenoff? The majority here urges that, since Kurshenoff bought two large quantities of counterfeit bills on two separate occasions from Russo, negotiated the sale price in terms of points, and was advised by Russo prior to the second sale that he had more to sell, there were sufficient facts to alert Kurshenoff that others were supplying Russo. None of these facts, singly or in the aggregate, is probative of such knowledge.

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3 Since the actual sales occurred in Manhattan, in the Southern District of New York, Kurshenoff was not charged with any substantive crime in the Eastern District.

I think that the basic error here is equating the sale of counterfeit money with illegal drug trafficking. In numerous cases, this court has described the typical functioning of the drug chain conspiracy—the progressive steps of importation of raw drugs, adulteration, packaging, wholesaling and eventual street retailing. In these cases, the very size of the sales and the circumstances of distribution at various levels were persuasive of the existence of a continuing chain conspiracy and the knowing participation of the actors at each level in the ongoing venture. See *United States v. Miley, supra*, at 2388-89; *United States* v. *Tramunti*, slip op. 2107, 2136-38 (2d Cir. March 7, 1975); *United States* v. *Sperling*, 506 F.2d 1323, 1340 (2d Cir. 1974); *United States* v. *Mallah*, 503 F.2d 971, 983-84 (2d Cir. 1974); *United States* v. *Arroyo*, 494 F.2d 1316 (2d Cir.), cert. denied, 95 S. Ct. 46 (1974); *United States* v. *Bynum*, 485 F.2d 490, 495-97 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 903 (1974). In my view, the same considerations are not necessarily present in the counterfeiting venture before us. A few plates and negatives here alone could furnish phony ten dollar bills on a continuing basis. The size of a purchase of this type is not indicative of an organization assuring a steady supply but simply of equipment in a back room turned on to meet the demands of customers. Kurshenoff could not reasonably have supposed that he was the only customer; but why he should have imagined that others in a top echelon above Russo were also involved is not clear to me.

The fact that he bought the bills at a discount does not establish anything more sinister than the transactions themselves. Even a purveyor of perukes would understand that bogus bills are not to be purchased at face value. Although Russo called Kurshenoff after he received a second shipment from McMillan, there is nothing in the tran-

script to indicate that he had mentioned receiving it from a third party. His testimony was:

> And then the second time—I believe I called up Herbie and told him I had some more and I was coming over with some.

The Government argues that since Russo was practically illiterate—he had the reading skills of a third grade student—Kurshenoff should have known that Russo did not make the money himself. This is a *non sequitur*. The printing of counterfeit money is hardly a vocation which demands a classical education as a prerequisite. A counterfeiter is not an author but a copier, and presumably he could duplicate bills in any foreign currency without being polylingual.[4]

A principal reason for this separate opinion is that this court has recently said on two separate occasions involving drug conspiracies that it has become all too common for the Government to bring indictments against numerous defendants on the claim of a single conspiracy when the criminal acts could more reasonably and sensibly be regarded as two or more conspiracies. See *United States* v. *Miley*, *supra*, at 2389 n.10; *United States* v. *Sperling*, *supra*, at 1340-41. The drug cases are applied here to a counterfeiting case, which, as we have pointed out, is a distinguishable criminal undertaking. Since it is easier to prove a single drug conspiracy than it is to show a single conspiracy for other criminal purposes, our warnings to the Government become especially relevant in a case like this one.

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4 Strangely enough, Russo was a licensed real estate salesman. He testified that he managed to obtain his license without being able to read the questions on the examination, by guessing at the answers to multiple choice questions. This suggests either that Russo possesses exceptional extrasensory perception, or that the examination techniques employed need to be tightened and the proctoring process reviewed. Russo's ability to count is unchallenged.

In sum, I do not think that the evidence in this case was sufficient to show any connection between Kurshenoff and the criminal enterprise run by the principal malefactors, nor do I believe that anything in Kurshenoff's dealings with Russo would justify this court in finding that Kurshenoff must have known of a criminal participation beyond that of Russo. While Kurshenoff was no stranger to the spurious in his regular calling, there is no showing of expertise on his part in the product extension attempted. However, I can find no prejudice to Kurshenoff so serious as to require the reversal of his conviction.

a prima facie case under Rule 29. I won't argue that motion. Motion denied.

Mr. Krinsky.

MR. KRINSKY: Your Honor, Mr. Kurschenoff was only named in count 12, the conspiracy count and pursuant to Rule 29 I move for a judgment of acquittal.

Your Honor, I think there is a very serious question here as to whether Mr. Kurschenoff can be tied to this conspiracy. Obviously there is a credibility question to Mr. Russo, since he's the only individual who puts him into this case, and it must be beyond a reasonable doubt, and that's a jury determination.

Howeve,r even if you believe Russo, and of course I submit you can't beyond a reasonable doubt, even if you believe Russo, the only evidence in this case according to Russo's testimony, allegedly on two occasions in the middle or end of June or June or sometime in July, he came to Mr. Kurschenoff's place of business in Manhattan, Southern District of New York, and delivered two $5,000 packages of counterfeit money. There is no evidence to show that Mr. Kurschenoff, if you believe Mr. Russo, knew, number one, that he was doing anything more than committing a specific isolated substantive criminal

act, namely the receipt of counterfeit money in the Southern District of New York.

There is no evidence to show that Mr. Kurschenoff knew any of the other participants in the conspiracy, that he knew where Mr. Russo had gotten the money from, that he knew where, in fact, Mr. Russo was involved with others. There is no evidence to show that he knowingly and willfully agreed with Mr. Russoto be involved in this conspiracy, there is no evidence to show since this money is not before the Court, that it came from the printing.

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MR. KRINSKY: (Continuing) That it came from the printing press of Bogin, I submit there is no evidence to show that or insufficient evidence to connect the money that Russo allegedly transferred to Kurschenoff, to the printing plates and the printing press which are alleged to have printed all of this money which is before the Court.

Your Honor, it seems to me that if the Government were to prosecute Mr. Kurschenoff, then the proper prosecutorial method would have been to charge him in the Southern District of New York with two substantive offenses. There is nothing to tie him with a conspiracy to violate the counterfeit laws, of a conspiracy which emanted in the Eastern District of New York.

THE COURT: He is not indicted in the Southern district, is he?

MR. DE PETRIS: No, your Honor.

THE COURT: What do you have to say about that?

MR. DE PETRIS: Your Honor, the testimony is that the packages which were delivered to Mr. Kurschenoff were from the $225,000 packages which were receivable in June of 1972. Mr. Russo has testified that those were the packages that came from or which he obtained from Mr. McMillan, who in turn

obtained them from Mr. LaVecchia.

Now the Government would submit that similar to narcotics cases where one side deals with another and purchases narcotics, that the Second Circuit ruling I believe is that that individual must believe that that individual, analogous with Mr. Russo, obtained it from somewhere, and I don't believe the law is that he must know who the other individuals are, he must just know --

THE COURT: The law is the opposite, Mr. Krinsky, the defendant does not have to know all the participants.

MR. KRINSKY: That is true, I'm not disputing that, but what I'm saying is that the defendant does have to knowingly and willfully know that he is entering into a conspiracy, otherwise every time anyone would receive counterfeit money then just by virtue of committing that substantive act he also becomes a member of a conspiracy.

It seems to me there is no showing here of anything, no conversation, Mr. Russo did not testify that he had a conversation with Mr. Kurschenoff and that he said to Mr. Kurschenoff, Listen, I am getting this counterfeit money.

THE COURT: I think on the Pinkerton case a substantive act can be used as evidence of a conspiracy.

MR. KRINSKY: Your Honor, you must willfully become a member of a conspiracy, you must first show that.

I don't see any showing that Mr. Kurschenoff did anything other than, if you believe Russo, other than commit a specific substantive violation of the counterfeit laws in the Southern District of New York; I don't see how you can tie him to this conspiracy, I don't see how --

THE COURT: He must have known that the bills must have been printed by someone and that he was helping the printer dispose of them.

I think I will deny the motion with leave to renewal on any authorities you can cite to me at the end of the case.

MR. KRINSKY: The only other thing, your Honor, I believe your Honor reserved decision on the various exhibits which were being introduced, mainly the exhibits which related to the counterfeit money which was seized in the undercover sales by Martino, the printing plates, the negatives, etc.: I don't see how any of those exhibits can be tied or connected to Mr. Kurschenoff, and I don't see how they are admissible in a trial against him, and I would object to all of those exhibits being introduced into

[illegible], an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief. and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent i

Check Applicable Box

☐ Individual Verification — the in the within action; deponent has rea the foregoing and knows the contents thereof; the same is true t deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and a to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read th foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF Nassau ss.:

Carmela Carfora being duly sworn, deposes and says: deponent is not a party to the action. is over 18 years of age and resides at 4 Ruth Drive, Hicksville, New York 11801

Check Applicable Box

☒ Affidavit of Service By Mail — On April 22 1975 deponent served the within Notice of Motion, Affirmati upon David G. Trager Petition for Reargument & Rehearing E attorney(s) for People in this action, at 225 Cadman Plaza E., Brooklyn, N. the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on APRIL 22 1975

David W. McCarthy

DAVID W. McCARTHY
NOTARY PUBLIC, State of New York
No. 41-4525115
Qualified in Nassau County
Registered in Queens Co.
Commission Expires March 30, 19 76

Carmela Carfora
The name signed must be printed beneath
CARMELA CARFORA

ONLY COPY AVAILABLE